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Your Trade Secret is Safe with Us: How the Revision to Federal Rules of Civil Procedure Makes Discovery Presumptively Confidential

Kurt Putnam

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Your Trade Secret Is Safe With Us: How the Revision to Federal Rules of Civil Procedure Makes Discovery Presumptively Confidential

by KURT PUTNAM*

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I. Introduction

Protecting a client's proprietary business information from intentional or inadvertent disclosure during pretrial discovery is of paramount importance in modern federal litigation. Attorneys representing trade secret owners often use the stipulated protective order as a way of ensuring that the discoverable trade secrets remain confidential before, during, and after trial.

However, a quiet battle has been raging in the circuits over the propriety of these private agreements.¹ On the one hand, litigants see a stipulated protective order as the best way to protect their trade secrets in a federal court system that has increasingly applied a public right of access to discovery materials not used in a judicial proceeding. Allied with them are district court judges, who see stipulated protective orders as a way to increase court efficiency.²

* J.D., UC Hastings College of the Law, 2001.

1. *Citizens First Natl. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945-46 (7th Cir. 1999) (noting that the circuits reach different conclusions under different reasoning when considering, ratifying, or modifying stipulated protective orders).

2. One district judge, after deciding that a stipulated protective order could not be

Judges are reluctant to over-scrutinize an agreement between opponents, especially if the alternative is making a good cause determination on a document-by-document basis, or at best, based on a class of documents.³ In any case, the trial judge faces a daunting task in modern complex civil litigation without a protective order.

On the other side are the circuit courts, who criticize district judges for “rubberstamping”⁴ an agreement that is often “standardless, stipulated, permanent, frozen, [and] overbroad.”⁵ Circuits see this as abdicating trial court discretion, and valuing court efficiency above the longstanding right of the American public to inspect their court system.⁶ The frequent overruling of protective orders, sometimes years after they were issued, reduces litigants’ faith in their own agreements.⁷ This may encourage litigants to seek even tighter control over the fruits of discovery.⁸ Circuits also see

relied on to protect a deposition without an explicit showing of good cause, stated:

If courts were obliged to make determinations, item by item, as to the justification for confidentiality of every piece of [discovery produced] . . . there would be little time in which to do anything else. . . . The issue whether the material really should be kept [confidential], is left for another day, which fortunately seldom arrives – a circumstance that spares the courts much time which may be devoted to other litigants and the parties many dollars that otherwise would be spent litigating academic questions.

Greater Miami Baseball Club Ltd. Partn. v. Selig, 955 F. Supp. 37, 39 (S.D.N.Y. 1997).

3. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1123 (3d Cir. 1986).

4. The Sixth Circuit roundly criticized a trial court for allowing litigants to “adjudicate their own case based upon their own self-interest,” stating:

The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties, as it did here, allowing them to modify the terms of a court order without even seeking the consent of the court. The protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed.

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996). *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994), where the court opined: “Disturbingly, some courts routinely sign orders that contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.”

5. *Citizens First Natl. Bank*, 178 F.3d at 946 (remanding a stipulated protective order for good cause determination).

6. *Attorney’s Stipulated Protective Order Is Unacceptable*, 6 Fed. Discovery News (Nov. 13, 2000) (Judge quoted as saying, “[T]he general rule in the federal system is still freedom of information,” and that protective orders are still an “exceptional form of relief” when he refused to accept an order proposed by the parties in *Bryan v. The Pep-Boys*, No. 00-1525 (E.D. Pa. Sept. 21, 2000)).

7. Circuits take a dim view of these blanket agreements because “they are by nature overinclusive and are, therefore, peculiarly subject to modification.” *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988).

8. In deciding a post-settlement challenge to a protective order, the First Circuit wrote: “The plaintiffs’ underlying product liability claim has been settled. The discovery

stipulated protective orders as contributing to the general perception that courts operate in secret, and large, powerful defendants can manipulate the system to prevent disclosure of their wrongdoing – especially when it affects public health and safety issues.

The confusion in district courts exists because the circuits disagree about the legal reasoning to apply when considering if, when, and why a stipulated protective order should issue under the Federal Rules of Civil Procedure.⁹ Part II¹⁰ describes how and why parties seek a blanket stipulated protective order. Part III¹¹ will explore the Second Circuit's¹² statutory presumption of public access to discovery approach, based on a construction of the interplay between the former Rules 5(d) and 26(c) as announced in *In Re "Agent Orange" Product Liability Litigation*.¹³ This Note will explore whether the *Agent Orange* presumption can be supported under the December, 2000 revision of Rule 5(d), and whether the presumption is a misapplication of the common law right of access to judicial records doctrine. In Part IV,¹⁴ this Note proposes an approach like that followed by the First¹⁵ and Third¹⁶ Circuits. These circuits recognize that the common law right to access judicial records does not attach to discovery materials not used in a judicial proceeding, and reject a statutory presumption of public access.

If this approach is followed, the heightened protection against discovery access will better protect a litigant who is forced to reveal a sensitive trade secret during discovery from disclosure to non-parties, thereby reducing the need for a protective order. If further protection beyond that granted by common law is necessary, this Note proposes that Rule 26(c) protective orders should issue on a showing of good

dispute lives on, consuming the time and energy of the courts, largely as a contest between plaintiffs' counsel and the defendant-appellee. . . ." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 529 (1st Cir. 1993).

9. Throughout this note, "the Rules" refers to the current Federal Rules of Civil Procedure, "the former Rules" refers to the 1993 version, and "the revised Rules" refers to the December, 2000 revision.

10. See *infra* nn. 18-46 and accompanying text.

11. See *infra* nn. 47-87 and accompanying text.

12. See *In Re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987). Other circuits, most notably the Seventh Circuit in *Citizens First Natl. Bank*, 178 F.3d 943, have followed the Second Circuit's lead by citing *Agent Orange* as precedent.

13. *Agent Orange*, 821 F.2d at 138.

14. See *infra* nn. 88-125 and accompanying text.

15. *Pub. Citizen*, 858 F.2d at 791; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

16. *Cipollone*, 785 F.2d 1108, 1122 (3d Cir. 1986).

cause. Part V¹⁷ explores what showing need be made in such cases.

II. The Blanket Stipulated Protective Order¹⁸

The Federal Rules of Civil Procedure, originally adopted in 1938, codified a relatively new litigation concept called discovery.¹⁹ The Rules' civil discovery regime deliberately permitted liberal discovery to allow parties to narrow contested issues and find the truth before trial. Discovery under the Rules favors private resolution of discovery disputes,²⁰ and allows litigants to tailor their pretrial discovery through private agreements.²¹ The court purposely plays a "hands-off" role during discovery, and is generally not involved unless its discretion is invoked by a party.²² Thus, discovery under the Rules works to "secure the just, speedy, and inexpensive determination of every action."²³

A trade secret in an infringement case is virtually guaranteed to be discoverable because Rule 26(b)²⁴ places a low relevance threshold on what a party can discover from an opponent. This low relevance standard will produce much other "raw" information, including hearsay, rumors, raw data, notes, information possibly damaging to third parties, etc. Such information is potentially inaccurate,

17. See *infra* nn. 126-40 and accompanying text.

18. For examples of blanket stipulated protective orders, see *Leucadia Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 159 n. 3 (3d Cir. 1993).

19. Before the Rules were enacted, and in English common law, the pleading process served a discovery function of sorts. The Rules codified general discovery standards in Rule 26.

20. For instance, litigants cannot make a Rule 26(c) protective order motion until they can provide the court with "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. . . ." Fed. R. Civ. P. 26(c) (2003).

21. See e.g. Rule 26(f), which allows parties to change the "timing, form, or requirement for disclosures," or to agree to what "limitations should be imposed" on the discovery process. See *Aetna Casualty & Surety Co. v. George Hyman Const. Co.*, 155 F.R.D. 113, 116 n. 8 (E.D. Pa. 1994), which held that parties have the ability to stipulate among themselves to whatever confidentiality they "reasonably, lawfully, and ethically" conclude is appropriate.

22. An exception is the Rule 16 requirement that a discovery conference be held.

23. Rule 1.

24. Rule 26(b)(1) was revised in December, 2000, and the 2000 revision raised the relevance threshold from the former "subject matter relevance" standard. After the 2000 revision, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." Despite the use of stronger language in the revised Rule 26(b)(1), the Rule still dictates a lower relevance standard than that required by other Federal Rules such as Federal Rule of Evidence 401. Moreover, notwithstanding the higher relevance standard, trade secrets are still discoverable under the new Rule 26(b)(1).

misleading, irrelevant, or inadmissible at trial. Moreover, such raw information may refer to the trade secret itself, or contain enough information to reconstruct it. In the process of handing over many documents, a party may accidentally include the trade secret among the documents.

Parties commonly use the stipulated protective order when seeking to avoid disclosure of their trade secrets during discovery.²⁵ During the discovery planning stage, the party seeking protection proposes an agreement to protect the trade secret's confidentiality. Such agreements may require the opponent to refrain from disclosing the secret to third parties, or, if the opponent is a business competitor, from using the secret to their competitive advantage. These agreements may be very specific in their description of who has access to the fruits of discovery,²⁶ and usually include in the agreement the proviso that discovery is protected from access by non-parties.

The sheer volume of discovery in a modern, complex, commercial case may increase the likelihood parties will agree to the stipulated protective order.²⁷ If the case will produce a heavy volume of discovery, parties may propose a "blanket" protective order to avoid a document-by-document examination of discovery. Typical blanket orders purport to cover *all* discovery produced by a party, or may allow a party to unilaterally declare discovered information confidential.²⁸

Once the parties agree to terms of a protective order, the party seeking confidentiality motions the court under Rule 26(c), and presents the agreement as a stipulation. The movant also provides the

25. *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 857-58 (7th Cir. 1994).

26. For example, in *The Beam Sys.*, 1997 U.S. Dist. LEXIS 8812 at *12 (C.D. Cal. Feb. 5, 1997), the court ruled that disclosing software code to plaintiff's expert, who had an undisclosed business relationship with the plaintiff, was improper since the expert would not qualify as "independent". As such, the court precluded the expert from testifying at trial. The word "[i]ndependent" was defined very specifically by the court as:

"[N]ot dependent" on a party, "not affiliated" with a party, "not subject to the control of influence" of a party, and "lacking a social or business relationship" with a party. Mere technical non-employee status obviously is not enough to satisfy the requirement of independence, especially the software industry [sic], in which the use of independent contractors is widespread. If mere technical non-employee status were sufficient, the requirement of independence could be easily circumvented.

27. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 874 n. 6, 889 (E.D. Pa. 1981) (noting that litigants in most cases of "a modicum of complexity" agree to a stipulated protective orders which are later court-approved, and that 35 million documents were produced in the instant case). See also *Jepson*, 30 F.3d at 858 (stipulated protective orders are relatively common).

28. The party declaring information confidential is held to a good faith standard. See *Leucadia*, 998 F.2d at 159.

court with affidavits that good cause exists to justify the order under 26(c). It is unlikely the court will refuse to ratify such agreements under its Rule 26(c) power.²⁹

Blanket protective orders, however, have been increasingly criticized by the circuits and the general public. These blanket stipulated protective orders may rise to the level of abuse because they are frequently the product of a devil's bargain. When the party proposing the agreement is a large, well-funded defendant,³⁰ it can threaten to challenge a smaller plaintiff's discovery every step of the way. Unless they sign the agreement, the plaintiff faces lengthy and expensive discovery litigation.³¹ If the agreement refers to maintaining confidentiality beyond the pretrial stage, or extends into the trial or beyond, it can raise serious public policy and First Amendment questions.³² All too often plaintiffs in this situation choose to agree rather than expend significant resources on litigating discovery motions.³³

Plaintiffs' attorneys expend time and money obtaining discovery, and feel it increases efficiency if they can share their discovery with other potential plaintiffs similarly situated,³⁴ or use this discovery to

29. "[T]he court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person. . . ." Fed. R. Civ. P. 26(c). One commentator noted that "it is the rare judge who questions the terms of an agreement between the parties ending the litigation." C. Thomas Dienes, *Newsgathering and the Law* 254 (2d ed., LEXIS Pblg., 1999). Despite trial court grumbling and frequent overruling on appeal, judges routinely ratify stipulated protective orders. See e.g. *Hayden v. Appleton Papers, Inc.*, No. 86-5232 (E.D. Pa. 2000); *Bryan v. Eichenwald, et al.*, 2000 U.S. Dist. LEXIS 4317 (D. Kan. Mar. 30, 2000) (overturned on appeal due to abuse of discretion by lower court in approving stipulated protective order just because all parties agreed); *Rutigliano v. Valley Business Forms*, 2000 WL 1705152 (D. N.J. Oct. 6, 2000).

30. For a description of how defendants who are manufacturers overuse the stipulated protective order, thereby increasing their own costs of litigation and exercising unethical behavior, see C. Neal Pope & R. Timothy Morrison, *On the Limits of Discovery; How the Defense Abuses Protective Orders*, *The Recorder* 7 (Aug. 21, 1992). Cf. *Rex Linder, Assault on Protective Orders: President's Page*, 66 *Def. Counsel J.* 165 (April 1, 1999) (arguing that stipulated protective orders lower costs to litigants and that mutual confidentiality protects all litigants).

31. For an overview of how the discovery process is abused, see Warren Freedman, *The Tort of Discovery Abuse* 109-14 (Quorum Books, 1989).

32. Although First Amendment concerns have been raised over the years, *Seattle Times Co. v. Rhinehart* conclusively settled the matter with regard to pretrial restrictions. 467 U.S. 20, 33 (1984) (holding that pretrial protective orders do not raise a First Amendment prior restraint issue).

33. See e.g. *De Long Corp. v. Lucas*, 138 F. Supp. 805 (S.D.N.Y. 1956) (noting that protective orders were designed to reduce pretrial litigation, not add to it).

34. See *Poliquin*, 989 F.2d at 535 (noting that "effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material" and by preventing plaintiffs' attorney from using discovery obtained in instant case from

identify potential plaintiffs against the same or similar defendants.³⁵ Even with a protective order, a resourceful plaintiffs' attorney may find discovery has entered the judicial record, making protective orders that cover trial and post-trial periods necessary.³⁶ On the other hand, defendant manufacturers of similar products may find that sharing discovery helps an entire industry to fight suits by plaintiffs who are injured by the industry's products.³⁷

Circuit courts are increasingly sensitive to the charge that the judiciary functions behind a veil of secrecy.³⁸ The perception is that well-funded, savvy defendants can manipulate the court process to keep material that is potentially damaging to their reputations from being published in the media.³⁹ Public interest groups⁴⁰ charge that information vital to the public's health and safety comes out during discovery, but may be forever inaccessible when covered by a stipulated protective order.⁴¹ Some have proposed "sunshine" legislation in Congress, which would make all discovery and trial documents public.⁴²

Circuits are critical of district judges who ratify a blanket stipulated protective agreement, because of the increasingly prevalent view that the goals of discovery can best be fulfilled when discovery is

being used in other suits against same company due to existence of protective order).

35. *Id.* at 534 (plaintiffs' attorney not allowed to use discovery to uncover other potential plaintiffs against same defendant).

36. *Hoechst Diafoil Co. v. Nan Ya Plastics*, 174 F.3d 411, 419 (4th Cir. 1999) (protective order from previous case required plaintiff's trade secret to be purged from public record, but defendant in second case discovered description of trade secret in unsealed court file of the first case; summary judgment denied by court, which held that unintended disclosure did not constitute publication of trade secret).

37. This situation comes up in product liability cases, and especially in cigarette litigation. *See e.g. Cipollone*, 785 F.2d at 1115.

38. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3d Cir. 1995) ("In [another case], we emphasized the strong public interest in open proceedings. . . . The sharing of information among current and potential litigants is furthered by open proceedings.").

39. Litigation against cigarette manufacturers provides many examples of this situation. *See e.g. Cipollone*, 785 F.2d at 1109 (cigarette manufacturer unsuccessfully tried to block information about inadequate cigarette labeling from reaching the media, arguing it was covered by a blanket stipulated protective order).

40. *See e.g. Public Citizen, Inc. Joins Battle to Force Disclosure of Carbonless Copy Facts*, 9 Mealey's Emerging Toxic Torts (Aug. 18, 2000).

41. *See e.g. James Gill, Shintech and the Eggheads*, The Times-Picayune B7. (Feb. 25, 1998) (risk of contamination from proposed Shintech factory maintained as confidential information: "To admit the truth . . . would be smarter 'community relations.'").

42. Stephen Morrison, *Protective Orders and Confidentiality Agreements: They Need Protecting from Legislators*, 66 Def. Counsel J. 248 (1999) (noting that "[a]ny legislation that would have the effect of restricting the ability of courts to issue protective orders and confidentiality agreements should be carefully considered.").

open to non-parties.⁴³ Circuits claim that blanket stipulated protective agreement ratification under Rule 26(c) abdicates this Rule's requirement that the court find "good cause" for entering the order.⁴⁴ Appeal courts are sending these types of agreements back to the district for determination of whether good cause can be shown to support the order.⁴⁵

There seems to be a consensus that the current system needs fixing.⁴⁶ However, some of the frustration with blanket stipulated protective orders arises because districts do not have clear direction from circuits as to the legal basis for granting a Rule 26(c) protective order, or as to exactly what the rights of non-parties are with regard to discovery fruits.

43. *Wilk v. Am. Med. Assn.*, 635 F.2d 1295 (7th Cir. 1980)

44. *Citizens First Natl. Bank*, 178 F.3d at 946.

45. See e.g. *USA Tech., Inc. v. Alphanet Hospitality Sys., Inc.*, 1999 U.S. Dist. LEXIS 8120 at *2 (E.D. Pa. May 26, 1999) (stipulated protective order impermissibly vested in the parties the discretion to determine which documents were confidential, and that "substantial satellite litigation" was subsequently created by third parties to compel disclosure); *Public Has No Constitutional Right to Access Discovery Documents*, 6 Fed. Discovery News (Aug. 15, 2000) (Judge declined to modify a stipulated protective order in *Doe v. Blue Cross Blue Shield*, 103 F. Supp. 2d 856 (D. Md. 2000) because "the 20,000 pages of [documents produced during discovery] . . . had never been filed with the court", and without blanket protective orders "the court would "easily become a slave to the details of considering the confidentiality of individual documents.").

46. Gail Diane Cox, *P&G Peddles a Private Patent Court*, The Natl. L.J., Corporate Brief B1 (1998). Procter and Gamble's in-house counsel, Patrick Lane, proposed a private patent resolution court, citing frustration with federal court delays and expense in litigating patent disputes. In the proposed non-binding "court," little discovery would be allowed.

III. The Second Circuit's Approach: The Former Rules Created a Statutory Presumption That Discovery is Publicly Accessible

Underlying the discussion of blanket stipulated protective orders lurks the longstanding common law tradition that judicial proceedings are open to the public.⁴⁷ This public access extends to the right "to inspect and copy public records and documents,"⁴⁸ including the judicial records of civil cases.⁴⁹ This right, "which antedates the Constitution and which is now applicable in both criminal and civil cases, is now 'beyond dispute.'"⁵⁰ Because common law recognized no discovery as such, pleading served the essentially same function.⁵¹ The trial record did not begin until final pleadings were filed, so the right of access did not match to the pleadings until they were finalized and filed with the court.⁵² Thus, a difference was recognized between material analogous to raw discovery, and materials used in a substantive motion or entered as evidence during trial.⁵³

Under the common law, once discovery enters the judicial record, the court has (and retains) the affirmative power to deny or limit access to it "for improper purposes,"⁵⁴ such as gaining business information that would put a litigant at a competitive disadvantage.⁵⁵ Discovery needed less protection from non-party access because it was not a judicial proceeding, and discovery fruits were not accessible to non-parties.⁵⁶ Access to discovery only needed protection once it

47. The Supreme Court noted in *Richmond Newsps., Inc. v. Va.*, 448 U.S. 555, 570, 580 n. 17 (1980) that "historically both civil and criminal trials have been presumptively open," serving a "significant community therapeutic value."

48. *Nixon v. Warner Bros. Comm.*, 435 U.S. 589, 597 (1978) (noting that in America, courts presume that the public has a common law right to inspect public records and documents).

49. *Leucadia*, 998 F.2d at 161.

50. *Id.*

51. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396 (1979).

52. *Mokhiber v. Davis*, 537 A.2d 1110, 1110 (1988).

53. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993).

54. *Nixon*, 435 U.S. at 598.

55. *Id.* See also *Seattle Times*, 467 U.S. at 33 n. 19 ("[A]ccess to [courthouse records] customarily is subject to the control of the trial court.").

56. At common law, however, discovery was not a public event. *Seattle Times*, 467 U.S. at 33 (noting that pretrial depositions and interrogatories were not public at common law). Moreover, the Supreme Court has been reluctant to make it so. See C.J. Burger's concurring opinion in *Gannett*:

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial

entered the judicial record. Once a case has been fully adjudicated and judicial records are either returned to their owners or properly destroyed by the clerk of court, they are no longer judicial records, and are outside the jurisdiction of the court.⁵⁷

How does the traditional common law presumption of public access to courts and their records square with the relatively new statutory phenomenon of “discovery?”

The Second Circuit faced this question head-on in *In Re “Agent Orange” Product Liability Litigation*.⁵⁸ In the original *Agent Orange* suit, discovery was taken pursuant to two blanket stipulated protective orders. The parties then settled, agreeing that all discovery be returned to the party that originally produced it. The *Agent Orange* court examined the issue of whether third party intervenes, including the Vietnam Veterans of America and the Agent Orange Plaintiff’s Management Committee, had a right of access to all discovery produced during the original suit. The court recognized that per its previous interpretations of the Rules, common law controlled. As such, discovery was not accessible to non-parties since the discovery was never filed with the court, and thus no right of access attached.

However, the court in *Agent Orange* (perhaps moved by a perceived inequity between injured Vietnam veterans and large manufacturers who produced dangerous chemicals that injured them in friendly fire⁵⁹), stretched to find a way to provide the non-parties discovery access.⁶⁰ The court announced that the Rules raised a statutory presumption that discovery is public even if not filed with the court, thus trumping the common law right of access doctrine.⁶¹ The *Agent Orange* court ruled that court-sanctioned blanket

interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a “trial” until and unless the contents of the deposition are offered in evidence.

Gannett, 443 U.S. at 396.

57. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988).

58. *Agent Orange*, 821 F.2d 139.

59. *Cipollone*, 785 F.2d at 1114 n. 8 (quoting the district court as saying that it “cannot ignore the might and power of the tobacco industry and its ability to resist the individual claims asserted against it and its individual members” when denying a Rule 26(c) motion by tobacco company defendant).

60. According to the *Agent Orange* court, the high interest of the general public in this public health and safety issue makes access to discovery more desirable. *Agent Orange*, 821 F.2d at 146.

61. At the time, the Southern and Eastern District of New York’s local rules prohibited litigants from filing discovery materials with the court “due to the volume of discovery materials” generated by these districts. *Agent Orange*, 821 F.2d at 146.

stipulated protective orders cannot overcome this statutory presumption. Therefore, the intervenors were successful in overcoming the stipulated protective orders and the terms of the settlement agreement.

Agent Orange arrived at this novel statutory presumption of open discovery by interpreting former Rule 5(d) to “embod[y] the [Advisory] Committee’s concern that class action litigants and the general public be afforded access to discovery materials whenever possible.”⁶² Furthermore, a presumption of public discovery “might undermine its primary goal of providing citizens and effective truth seeking procedure for resolving their disputes without impairing their other rights.”⁶³

The court interpreted former Rule 5(d) to mandate filing of discovery materials with the clerk of court,⁶⁴ notwithstanding a local rule forbidding filing discovery.⁶⁵ Since discovery is a matter of “legislative grace,” and not a constitutionally-protected right,⁶⁶ Congress could grant access if it wanted to.⁶⁷ In fact, the Second Circuit later ruled that a local rule excusing the mandatory filing of discovery materials under Rule 5(d) had the effect of denying the public a “right it would otherwise have had to inspect freely the discovery materials in this case.”⁶⁸ This represents a serious misreading of the common law.

Bolstering their argument, the *Agent Orange* court found that Rule 26(c)’s requirement that a movant for a protective order show “good cause” for issuing the order⁶⁹ led to the assumption that the materials must be accessible by the public or there would be no

62. *Agent Orange*, 821 F.2d at 146.

63. Arthur Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 Harv. L. Rev. 427, 432 (1991). See also *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

64. “Filing; Certificate of Service. [B]ut the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding. Former Rule 5(d). The *Agent Orange* court found the negative pregnant requiring a court order *not to file* presumed that *discovery would be filed otherwise*.”

65. *Pub. Citizen*, 858 F.2d 775, 781.

66. *Seattle Times*, 467 U.S. at 20.

67. *Id.*

68. *Pub. Citizen*, 858 F.2d at 780.

69. *Agent Orange*, 821 F.2d at 145. (quoting Rule 26(c), which provides that “upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .”)

reason to protect them.⁷⁰ However, the *Agent Orange* court seems to ignore the fact that a protective order issued under Rule 26(c) may be issued to prevent discovery altogether,⁷¹ to restrict the discovery methods used,⁷² or to protect information during and after trial.⁷³

Thus, because the Rules required a court order or local rule to avoid filing discovery, and a court order to maintain secrecy, discovery must be presumed filed and part of the judicial record. Discovery was not protected from the right of access without an affirmative court order under 26(c), after a showing of good cause.

Several circuits have followed this statutory presumption,⁷⁴ even going so far as to rule that deponents could not reasonably rely on protective orders to restrict access to discovery not used at trial.⁷⁵ This construction of the Rules supported the Third Circuit's increasing distrust of blanket stipulated protective orders. Increasingly, that Circuit required an even higher standard of scrutiny on blanket stipulated protective orders to protect the public right of access as litigants' private confidentiality agreements.⁷⁶ This disfavor of privacy virtually mandates a balancing test be performed by the

70. *Id.* at 145-46.

71. See e.g. Rule 26(c)(1): that the disclosure or discovery not be had; Rule 26(c)(4): that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters. Fed. R. Civ. P. 26(c)(1), 26(c)(4) (2003).

72. See e.g. Rule 26(c)(2): that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; Rule 26(c)(5): that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery. Fed. R. Civ. P. 26(c)(2), 26(c)(5) (2003).

73. See e.g. Rule 26(c)(6): that a deposition, after being sealed, be opened only by order of the court; Rule 26(c)(7): that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; Rule 26(c)(8): that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. Fed. R. Civ. P. 26(c)(6), 26(c)(7), 26(c)(8) (2003).

74. Circuits using the *Agent Orange* rationale: *Citizens First Natl. Bank*, 178 F.3d 943 (7th Cir.); *San Jose Mercury News, Inc. v. U.S. D. Ct. - N.D. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public."); *Ironclad, L.P. v. Poly-America, Inc.*, 2000 U.S. Dist. LEXIS 10728 at *48 (N.D. Tex. July 28, 2000) (Tenth Circuit case, citing *Agent Orange*, 821 F.2d at 145-46: "[g]enerally, the public has a right of access to discovery materials, especially when the subject matter of the litigation is of special public interest."); *Tavoulareas v. The Washington Post*, 724 F.2d 1010, 1016 (D.C. Cir. 1984) ("Courts have been virtually unanimous in concluding that the [Rules] presume open discovery."). Although the Eighth Circuit has not explicitly decided the issue, the court has commented in dictum, however, that "Rule 5(d) clearly contemplates that the public has some interest in the content of documents 'required to be served. . .'" (*N. Sts. Power Co. v. Westinghouse Elec. Corp.*, 156 F.R.D. 168, 171 (D. Minn. 1994).

75. *Greater Miami*, 955 F. Supp. at 40.

76. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791-92 (3d Cir. 1994).

court whenever parties wish to protect their discovery from non-parties.⁷⁷

However, the December, 2000 revisions to the Rules has virtually foreclosed the *Agent Orange* reasoning. The United Supreme Court promulgated changes to the Federal Rules of Civil Procedure and submitted them to Congress in April 2000.⁷⁸ While some of the proposed amendments to the federal discovery regime have been vigorously debated,⁷⁹ the change to Rule 5(d) has gone virtually unnoticed.⁸⁰

The revised Rule 5(d) now mandates that initial disclosures and "discovery requests and responses,"⁸¹ "*must not be filed* until they are used in the action."⁸² The Advisory Committee's notes on the 2000 revisions noted the costs incurred by litigants and the courts in the filing and storage process, and meant to conform this rule to widespread local rules forbidding discovery filing.⁸³ The permissive aspect of former rule 5(d), allowing local federal district courts to

77. Soon after the *Pansy* decision, the Third Circuit was criticized for allowing ex post facto opening of stipulated confidentiality agreements at the expense of commercial litigants' interests in maintaining pretrial confidentiality and lower costs. See Shannon P. Duffy, *Rules are Changed on Confidentiality; Spate of Federal Rulings Make Protective Orders Uncertain*, *The Legal Intelligencer* (July 11, 1994).

78. See e.g. Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 *Cardozo L. Rev.* 75 (2000) (article discusses Rule revisions generally, but does not discuss revisions to Rule 5(d) specifically).

79. For example, revised Rule 26(a)(1) changed the requirement that a litigant only disclose information that is "relevant to disputed facts alleged with particularity in the pleadings" to only material that "supports its claims or defenses, unless solely for impeachment." This change may have the effect of significantly reducing the amount of information exchanged in mandatory disclosure. Likewise, the revised Rule substitutes a "relevant to the claim or defense" standard for the "relevant to the subject matter" standard. This change also narrows the scope of discoverable material, and has been controversial. See *id.* at 75.

80. For a discussion of the new Rules, see Jack H. Friedenthal, *Symposium: Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 *J.L. & Policy* 67 (2000).

81. *Notes of Advisory Comm. on 2000 Amends.*, note to Subdivision 5(d).

82. *Id.* (emphases added). "Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admissions." Fed. R. Civ. P. 5(d) (2000).

83. The Advisory Committee "recogniz[ed] the costs imposed on parties and courts by the required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing." *Notes of Advisory Comm. on 2000 Amends.*, note to Subdivision 5(d).

override the filing requirement, was removed in the 2000 revision in the interests of judicial economy and the benefits of a national standard.⁸⁴ Thus, the revised Rule 5(d) no longer contains the negative pregnant clauses which the *Agent Orange* court relied upon.

The interpretation fits the underlying reason for creating the rules in the first instance. The 1934 Rules Enabling Act authorized the Supreme court to “prescribe general rules of practice and procedure . . . for cases in the United States district courts,” from which flowed the Rules in 1938. The Act also provided that the “rules shall not abridge, enlarge or modify a substantive right.” While increasing public access to discovery may seem like a worthy policy goal, it both enlarges the common law right and abridges the corollary right to privacy previously enjoyed by litigants preparing their case. The Rules, and the statute authorizing the Rules, simply does not support public access to discovery not part of the judicial record.

The problem with the statutory presumption approach in conjunction with a technical filing requirement is evident in a recent Third Circuit decision, *Pansy v. Borough of Stroudsburg*.⁸⁵ The *Pansy* court was faced with the ramifications of applying the statutory presumption to discovery attached to a private settlement agreement not filed with the court. The *Pansy* court reluctantly ruled that documents, once filed with a settlement agreement at the clerk of court, but returned to the parties pursuant to a stipulated protective order, were no longer judicial records to which a common law right of access attached.⁸⁶ The court itself notes that the First Circuit’s ‘filed but used for adjudicatory purposes’ rule is a “persuasive and perhaps desirable rule.”⁸⁷

IV. The First Circuit’s Approach: The Common Law Right of Access Principle Makes Discovery Presumptively Confidential

The *Agent Orange* statutory presumption may have contributed to the current controversy about the status of discovery in the federal courts. The presumption of non-party access works to inadequately

84. *Id.* (noting that “costs and burdens would likely change as parties make increased use of audio- and video-taped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.”).

85. *Pansy*, 23 F.3d at 772.

86. *Id.* at 783 (noting the First Circuit arrived at a “desirable rule” but also found that they were “bound by [internal rules]” to “follow the decision”).

87. *Id.*

protect parties in their own litigation. The heightened requirement for showing good cause before a protective order can issue increases the costs of pretrial litigation and creates a quagmire of balancing factors for the district judge to consider, even in a case that will probably never reach the trial stage.

A better approach is that used in *Anderson v. Cryovac*.⁸⁸ In *Cryovac*, decided before *Agent Orange*, the court based its reasoning on the implicit assumption that the Rules did not usurp the traditional and longstanding federal common law principle of confidential discovery. The *Cryovac* court reaffirmed the common law presumption that public access to judicial records is a foundation of the American court system, and it does not “encompass discovery materials.”⁸⁹ The court declined to open discovery to a right of access, unless the discovery was used to adjudicate a substantive right,⁹⁰ and therefore a part of the judicial record. *Cryovac* further held that “a request to compel or protect the disclosure of information in the discovery process is not a request for a disposition of substantive rights.”⁹¹ Discovery, and motions on discovery, were outside the right to a presumption of access.⁹² Keeping discovery outside the common law right of access makes discovery more efficient,⁹³ perhaps because it requires fewer pretrial motions on confidentiality. Forcing a trial court to balance the public’s right of access against litigants’ concerns of privacy cuts against modern discovery goals of efficient, speedy resolution of civil cases.⁹⁴

The First Circuit backed away from this posture⁹⁵ somewhat in *Public Citizen v. Liggett Group, Inc.*⁹⁶ The *Public Citizen* court examined whether a blanket stipulated protective order could be modified after the underlying case had been dismissed pursuant to a

88. See *Cryovac*, 805 F.2d at 13 (“There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.”).

89. *Id.*

90. *Id.* at 11 (“We . . . hold that there is no right of public access to documents considered in civil discovery motions.”).

91. *Id.* at 13 (comparing discovery motions to summary judgment motions, and noting that a right of access attaches in summary judgment motions since substantive rights are adjudicated in summary judgment motions).

92. *Id.* at 14.

93. *Id.*

94. *Id.* at 13-14.

95. *Citizens First Natl. Bank*, 178 F.3d at 946 (noting that the First Circuit, “which used to endorse broad umbrella orders [citing *Anderson*] have moved away from that position [citing *Public Citizen*]).

96. *Public Citizen*, 858 F.2d at 789.

Rule 12(b)(6) motion for failure to state a claim upon which relief could be granted.⁹⁷ The court declined to agree with plaintiffs' argument that former Rule 5(d)'s filing requirement raised a presumption of right of access, holding that when litigants don't file discovery materials with the court clerk, non-parties have no right to demand access; the materials are "solely in the hands of private party litigants."⁹⁸

However, *Public Citizen* agreed with *Agent Orange*'s analysis of Rule 26(c) requiring a good cause showing before *any* protective order can issue. *Public Citizen* then ruled that the blanket stipulated protective order was unsupported by a good cause showing, and motivated it to allow parties to disseminate discovery, but right to access discovery for non-parties.⁹⁹

A final word was announced in *Banco Popular de Puerto Rico v. Greenblat*.¹⁰⁰ "[T]he law simply does not grant a right of access [to unfiled discovery] to a nonparty."¹⁰¹ Again, the First Circuit court paid lip service to the statutory presumption possibility in dicta,¹⁰² but ultimately rules in favor of *Cryovac* approach.

The December, 2000 revision to Rule 5(d) significantly impacts the reasoning in a case like *Agent Orange*.¹⁰³ Congress made depositions in antitrust actions public; had they wanted it to be that way in all civil cases, they would have explicitly done so.¹⁰⁴

Using the *Cryovac* rationale,¹⁰⁵ raw discovery that is not used

97. *Id.* at 780.

98. *Id.* at 790-91.

99. *Id.* at 791.

100. *Banco Popular de Puerto Rico v. Greenblat*, 964 F.2d 1227, 1232 (1st Cir. 1992) ("This case does not involve a right of public access, based either on the First Amendment or the common law, to records and documents *filed with the district court.*" (emphasis added)).

101. *Id.* at 1233.

102. *Id.* at 1233 n. 5. ("It is, of course, possible [per *Agent Orange*] that, under certain circumstances, the public may enjoy a right of access to discovery materials . . . based on [Rule] 5(d) in conjunction with [Rule] 26(c); the [petitioners have], however, launched no such contention.").

103. *Agent Orange*, 821 F.2d at 145 (decision based on statutory construction, not common law or constitutional grounds).

104. *U.S. v. United Fruit Co.*, 410 F.2d 553, 555-56 (5th Cir. 1969) (citing the Publicity in Taking Evidence Act, 15 U.S.C. § 30 (1913)).

105. Circuits that have followed the First Circuit's approach include the Third Circuit and the Tenth Circuit: *Bank of Am. Natl. Trust & Sav. Assn. v. Hotel Rittenhouse Assn.*, 800 F.2d 339, 343 (3d Cir. 1986) ("[D]iscovery . . . which is ordinarily conducted in private, stands on a different footing than does a motion filed by a party seeking action by the court."); *Leucadia*, 998 F.2d at 161-62 (in *Leucadia*, the Third Circuit declined to extend common-law public access to discovery filed with pretrial discovery motions, reasoning

remains private. Per that reasoning, courts should not scrutinize agreements made about raw discovery not used substantively in a judicial proceeding.

Once courts adopt the common law approach of the First Circuit, the point at which the public right to access discovery attaches becomes important. There are two competing ideas of when a document can be classified a "judicial document" to which the right of access attaches.¹⁰⁶ In light of the revisions to Rule 5(d) and the requisite rejection of the *Agent Orange* reasoning, the technical approach taken by some courts should be rejected.¹⁰⁷ This approach makes *actual filing*¹⁰⁸ the deciding criterion.¹⁰⁹ Thus the technical Rule 5(e) physical delivery requirement of materials to the court clerk, who then dates and files the materials, should not be determinative of when the right to access attaches.¹¹⁰

A better solution is to look at what role the material in question played¹¹¹ in the adjudication process.¹¹² The Advisory Committee stated that "only those parts of voluminous materials that are *actually used* need be filed."¹¹³ "In connection with proceedings in court,

that it would chill parties' filing of legitimate discovery motions); *Okla. Hosp. Assn. v. Okla. Pblg. Co.*, 748 F.2d 1421 (10th Cir. 1984) (finding that although *parties* have a "constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order," non-party media do not constitute members of the public under *Seattle Times*, and thus do not have standing to force party to disseminate discovery fruits.)

106. *U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995).

107. *Zenith Radio*, 529 F. Supp. at 897 n. 55 ("[W]e believe that pretrial evidentiary hearings in which rulings binding at trial are made, can fairly be said to be part of the trial itself. In any event, we have no doubt that the presumption of openness applies as fully to pretrial proceedings, at least in civil litigation.").

108. *Leucadia*, 998 F.2d at 161-62 (Filing a document with the court "gives rise to a presumptive right of public access.").

109. *Pansy*, 23 F.3d at 782.

110. Rule 5(e): "Filing With the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk." Fed. R. Civ. P. 5(e).

111. *Cryovac*, 805 F.2d at 13; *see also U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (citing *Cryovac*).

112. *Id.* ("[C]ourts have not extended [the common law presumption] beyond materials on which a court relies in determining the litigants' substantive rights."); *Amodeo*, 44 F.3d at 145; *Policy Mgmt. Sys. Corp. v. Spear*, 1995 U.S. App. LEXIS 25900 at *12 (4th Cir. 1995) (per curiam) (holding that "a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach.").

113. Fed. R. Civ. P. 5 (2002) 2000 Amendment Advisory Committee Notes (italics added).

however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding."¹¹⁴

This puts the decision to make discovery material accessible to non-parties squarely in the hands of the litigants themselves. A trial court judge may not prevent a party from filing material into the judicial record *sua sponte*,¹¹⁵ but when the judge's discretion is invoked by one of the parties for good cause, he may decide to prevent filing of documents in a suit.¹¹⁶ Litigants, while preparing for trial, can balance the evidentiary importance of the discovery against any private agreements they have with their opponent,¹¹⁷ and then enter discovery onto the record.

However, once a litigant decides to use the discovery as part of the judicial records ("all papers, exhibits, and affidavits on file with the court"¹¹⁸), the common law right of access attaches, and on appeal, the court will consider the discovery in its determination of the case.¹¹⁹

Under this approach, a motion to dismiss under Rule 12(c)¹²⁰ looks only at the sufficiency of the pleadings, discovery materials filed in support of the motion are not considered by the court in its ruling, and are not "judicial documents."¹²¹ In contrast, discovery materials supporting a summary judgment motion,¹²² trial transcripts and exhibits, settlement documents, and preliminary injunction hearing transcripts have been and should continue to be part of the judicial record to which the right of access attaches.¹²³ It is important to note that otherwise accessible documents should not be construed as

114. *Id.*

115. *Intl. Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 46 (2d Cir. 1975).

116. *Id.* at 46.

117. *Wilk*, 635 F.2d at 1299.

118. *Intl. Bus. Machs. Corp.*, 526 F.2d at 45.

119. *Id.*

120. Rule 12(c): "Motion for Judgment on the Pleadings. . . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Thus, in a pure Judgment on the Pleadings, the court will only look at the sufficiency of the pleadings on their face; if the movant attaches, i.e., discovery, it becomes a Summary Judgment motion and is decided on its merits. Fed. R. Civ. P. 12(c) (2002).

121. *Policy Mgmt. Sys. Corp. v. Spear*, 1995 U.S. App. LEXIS 25900 at *10 (4th Cir. 1995) (finding that material filed with motion to dismiss retains discovery status and that no common-law right of access attaches).

122. *Cryovac*, 805 F.2d at 13; *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

123. *Leucadia*, 998 F.2d at 163-65.

confidential merely because they are filed with a pretrial motion.¹²⁴

This solution increases works to freely provide discovery among parties in confidence, without having to consider a non-party gaining access, unless and until a party enters the discovery into the judicial record.

V. The Status of Stipulated Protective Orders Under the Common Law Confidentiality Presumption

The principle that the Rules do not negate the common law presumption of confidential discovery will alleviate some of the concerns raised by the court and litigants, but it is not a cure-all. For instance, some types of discoverable information still needs to be protected, even when entered into the judicial record and presumptively accessible by non-parties.

Stipulated protective orders can't survive the new rules when they cover "judicial documents."¹²⁵ Under the *Cryovac* common law approach, parties with trade secrets to protect have better reason to rely on confidentiality during the pretrial stage. Blanket stipulated protective orders that add no additional protection to trade secret must be protected during the trial and after.

Therefore, parties should look to Rule 26(c) for protection of discovery entered into the trial record. It is here that the common law right of access attaches, as well as First Amendment considerations.¹²⁶ Because the court has the power under Rule 26(c) to prevent discovery or to order that discovery be protected from disclosure, this Rule does raise the presumption that a showing of good cause will prevent disclosure even after discovery enters the trial record.

Rule 26(c) anticipates that parties will have to show good cause for at least some classes of material,¹²⁷ if not a document-by-document

124. *Id.* at 162 (documents filed with motion to compel discovery presumptively public under common law right of access).

125. See e.g., *Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999) (stipulated protective order not granted for covered judicial documents, including trial testimony).

126. This was the situation in *Cipollone*: [I]t appears . . . that confidentiality was maintained during the initial phase of the litigation by tacit mutual understanding and that it was only when plaintiffs' counsel evinced an intention to use the material beyond the confines of the litigation that the protective order phase of the litigation began. *Cipollone*, 785 F.2d at 1110 n. 1.

127. For example, parties would likely have to show good cause to protect any revelation of trade secrets entered into the trial record.

showing. Rule 26(c) should not be construed so far as to permit blanket stipulations, in good faith, that all discovery is protectable.

Parties must be required to show good cause before a protective order is issued.¹²⁸ The party seeking a Rule 26(c) protective order has the burden¹²⁹ to prove that good cause exists,¹³⁰ and that it outweighs the opponent's showing that the material is sufficiently necessary and relevant to his case to outweigh the harm of disclosure.¹³¹ Broad allegations of harm, unsubstantiated by specific examples or articulate reasoning, do not support a finding of good cause.¹³²

Courts purport to hold parties to the "good cause" standard when negotiating a stipulated protective order between themselves¹³³ through affidavits.¹³⁴ Parties entering into a protective order without an explicit judicial finding of good cause do so at the risk of having the evidence unsealed.¹³⁵ However, the good cause standard is usually applied retroactively. District courts should refrain from adding clauses into blanket stipulated protective orders reserving the right to demand a good cause showing.¹³⁶ Rule 26(c) clearly demands that good cause be shown before the protective order is issued.¹³⁷

Where possible, a document-by-document approach should be

128. "Protective Orders. Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown . . . the court in the district where the deposition is to be taken may make any order which justice requires to protect a party [for specified reasons]." Fed. R. Civ. P. 26(c) (2002).

129. *Penthouse Int'l v. Playboy*, 663 F.2d 371, 391 (2d Cir. 1981).

130. *In re Wilson*, 149 F.3d 249, 252 (4th Cir. 1998).

131. *Id.* at 252-53 (disclosure of defendant's trade secret so vital to plaintiff's case, outweighs harm to defendant).

132. *USA Tech.*, 1999 U.S. Dist. LEXIS 8120 at *1.

133. See e.g. *Makar-Wellbon v. Song Electronics*, 187 F.R.D. 576 (E.D.Wisc. 1999) (blanket stipulated protective order denied because "good cause" specifically demanded by federal rule, even in agreement between parties).

134. One conclusory affidavit is "insufficient to establish good cause" under 26(c). See *In re Exxon Valdez*, 1990 U.S. Dist. LEXIS 7999 at *5 (D. Alaska 1990). *Contra. In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C. Cir. 1985) (upholding stipulated protective order for 100,000 documents on affidavit "describing general terms the negative effect release of the materials as a whole" would have on Mobil Corp.'s business).

135. *Greater Miami*, 955 F. Supp. at 40 (deponents not justified in assuming confidentiality will be maintained without a good cause determination by the court).

136. *District Focus: Judges Reserve Right to Quash Protective Order*, 2 Fed. Discovery News (June 1996) (quoting judges who insert "subject to public policy and other considerations" or "subject to being modified or vacated by me for good cause shown" into stipulated protective orders).

137. "[U]pon motion . . . and for good cause shown . . . the court . . . may make any order which justice requires to protect a party. . . ." Rule 26(c).

adopted.¹³⁸ This would affirmatively place the burden on and increase litigation costs for the party seeking protection, but this is preferable as opposed to placing the burden on the party seeking disclosure. When such an approach is not feasible, a court should look at protecting classes of documents.¹³⁹

Requiring an affirmative good cause showing before a court issues a Rule 26(c) protective order would significantly reduce the necessity of blanket stipulated protective orders. Furthermore, it would require the district to employ the discretion demanded of it by the Rules and reduce appellate modification or overruling.

VI. Conclusion

Stipulated blanket protective orders serve an important function for litigants and court in modern federal pretrial practice. But they have developed largely in response to an increasing view that raw discovery fruits are presumptively accessible to non-parties.

The revision to the Rules, however, have reduced their necessity by foreclosing a statutory presumption of discovery accessibility, and reaffirming the longstanding common law rule of right of access to the judicial record only.

Holding non-party access to the judicial record, however, is not the full answer for litigants who have trade secrets to protect—but a well-supported Rule 26(c) protective order, issued after a good cause showing to the court, is presumptively valid and less likely to be modified later.

Taken together, these approaches to non-party access to discovery materials will ensure that parties can rely on the protection they need during litigation.

138. *Cipollone*, 785 F.2d at 1123 (in dictum, advocating this approach for cases where court suspects litigant's confidentiality designations are spurious). *But see Greater Miami*, 955 F. Supp. at 39 (after giving confidentiality order over deposition little weight, the court notes that if "courts were obliged to make determinations, item by item, as to the justification for confidentiality of every piece of evidence as to which any party or witness made such a claim . . . there would be little time in which to do anything else.").

139. The Seventh Circuit's insistence on a good cause showing has been reflected in their district decisions. *See e.g. Makar-Wellbon*, 187 F.R.D. at 577-78 (blanket stipulated protective order denied, but court notes a protective order would be granted with "a more specific description of the individual documents or categories of documents they seek to protect.").

* * *